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No. 90-696

In The

Supreme Court of the United States

October Term, 1990

LEO HEIDEMAN AND SHIRLEY HEIDEMAN,

Petitioners,

vs.

PFL, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether "special and important" reasons exist for granting a writ of certiorari in this matter?

2. Whether the Eighth Circuit properly affirmed the grant of summary judgment on the grounds that Mr. Heideman's claim under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621-634 (1982 & Supp. V 1987) was untimely?

3. Whether the Eighth Circuit properly affirmed the grant of summary judgment on the grounds that Mr. Heideman's claim under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C.A. §§ 1001-1461 (West 1985 & Supp. 1989) and Petitioners' state law claims were untimely?

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Respondent PFL, Inc. respectfully requests that this Court deny the Petition for Writ of Certiorari (the "Writ"), seeking review of the Eighth Circuit's opinion dismissing Petitioners' appeal of the District Court's grant of summary judgment in this case under Federal Rule of Civil Procedure 56(c).

OPINIONS BELOW

The decision of the Court of Appeals is reported at 904 F.2d 1262 (8th Cir. 1990) and is set out in Petitioners'

Appendix at A1-13. The unpublished order denying rehearing is set out at page A30 of Petitioners' Appendix. The district court's opinion of April 11, 1989 is reported at 710 F. Supp. 711 (W.D. Mo. 1989), and is set out in Petitioners' Appendix at A31-79. The district court's Pretrial Conference Order is set out in Respondent's Appendix at A1-3. The stipulation of facts upon which summary judgment was granted is in Respondent's Appendix at A4-13.

JURISDICTIONAL STATEMENT

Petitioners purport to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE, RULE AND CONSTITUTIONAL PROVISIONS INVOLVED

In addition to those set forth by Petitioners in the Writ, the following statutes are germane to the Writ.

Federal Rule of Civil Procedure 42(b) provides in relevant part:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

Federal Rule of Civil Procedure 52(a) provides:

> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . . It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

Petitioners Leo and Shirley Heideman (collectively "Petitioners") request a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit on the Eighth Circuit's affirmance of the District Court's Order of April 11, 1989 granting summary judgment to Respondent PFL, Inc. ("PFL", "Jeno's" or "the Company").

Petitioner Leo Heideman ("Heideman") was discharged from his job as Regional Manager of Jeno's, Inc.

in June, 1979. On November 25, 1987, more than 8 years after his discharge, Heideman, joined by his wife, filed a five count complaint against PFL, Inc. Count I of the complaint alleged that Heideman was discharged because of his age in violation ofthe Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1982 & Supp. V 1987) ("ADEA"). Count II of the complaint alleged that Heideman was discharged in violation of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C.A. §§ 1001-1461 (West 1985 & Supp. 1989). Counts III and IV of the complaint are claims for fraud and the intentional infliction of emotional distress. In Count V, Mrs. Heideman asserts a claim for loss of consortium.

1. The Proceedings Below

On August 24, 1988, Respondent filed its motion for summary judgment contending that Petitioners' claims were barred by the applicable statutes of limitations and also that several of the claims were substantively deficient. On August 31, 1988, the district court entered an Order pursuant to Fed. R. Civ. Proc. 42(b) separating out for independent adjudication the statute of limitations issues presented by Respondent's motion for summary judgment. (Respondent's A1-3). The court also directed the parties to attempt to agree upon a stipulation of facts to be used in deciding Respondent's motion for summary judgment. (Respondent's A1, ¶ 2(a)). Pursuant to the district court's order, the parties stipulated to virtually all of the facts material to the statute of limitations questions. (Respondent's A4-13). The parties then executed

and filed that stipulation of facts to be used by the district judge in ruling on the summary judgment motion. (Respondent's A4-13).

On April 11, 1989, the district court entered an Order granting PFL's motion for summary judgment and dismissing all of Petitioners' claims. (Petitioners' A13). In granting the motion, the district court relied on the stipulated facts which, by definition, were not in dispute. (Petitioners' A31-79).

Petitioners appealed that Order to the Eighth Circuit. The Eighth Circuit panel unanimously affirmed the district court's grant of summary judgment. (Petitioners' A1). Petitioners' motion for rehearing in the Eighth Circuit was denied. (Petitioners' A30).

2. The Facts

The relevant facts can be stated briefly. Heideman was hired by Jeno's in 1964 as a Regional Sales Manager in Kansas City, Missouri. (Respondent's A4, ¶ 1). Heideman's performance was generally satisfactory during his early years with the Company and accordingly, he was promoted to various positions within the Company. (Respondent's A5, ¶ 5). During the course of his employment with Jeno's, Heideman worked primarily out of his home in Kansas City, Missouri although he frequently traveled to the Company's corporate headquarters in Duluth, Minnesota. (Respondent's A5, ¶ 7).

In December, 1978, during one of Heideman's visits to the Company headquarters, Heideman was notified that he was being demoted and reassigned to the position

of Regional Manager in Memphis, Tennessee. (Respondent's A7, ¶ 14). At the time of the demotion, Heideman was replaced in Kansas City by Ed Korkki, who Heideman believed was 10 to 15 years younger than himself. (Respondent's A8, ¶ 16). Approximately six months later, in June, 1979, Heideman was discharged as Regional Manager in Memphis, Tennessee. John Parr, the Company's Executive Vice President for Marketing and Sales, notified Heideman of his discharge. (Respondent's A8, ¶ 18).

Parr told Heideman he was being fired because "he did not fit into Carl Hill's plans." (Petitioners' A3). In a letter dated twelve days after Heideman's discharge, the Chairman of Jeno's, Jeno Paulucci, indicated that Heideman had been fired because he had not worked hard enough. (Petitioners' A4-5). Heideman strongly disagreed with that assertion because, in his words, they were not "too many people that worked any longer hours or harder than [he] did." (Heideman Depo. p. 93).

Heideman felt that he had not been told the "real reason" for his separation, "and that he was being lied to." (*See* Respondent's A9, ¶ ¶ 21-22, Heideman Depo. p. 123). Heideman further believed that he had been lied to back when Carl Hill (another member of Jeno's management) had told Heideman at the time of his transfer that he (Hill) wanted Heideman to build the Memphis region. (*See* Respondent's A9, ¶ ¶ 21-22; Heideman Depo. p. 122). Heideman felt that he had been "moved and deceived" because Carl Hill "never had any intention of keeping [him]," but rather had all along intended to terminate Heideman shortly after transferring him to Memphis. (Heideman Depo. p. 122).

Shortly after his discharge, Heideman contacted an attorney in Memphis to ascertain what his legal rights were. He also visited the Memphis office of a federal agency that Heideman thinks was the National Labor Relations Board. (Respondent's A9-10, ¶ ¶ 23-24). Although the attorney offered to look into the situation, Heideman decided not to pursue the matter further primarily because of the cost involved in retaining an attorney. (Respondent's A10, ¶ 24).

Some seven years later, in August, 1986, Heideman received a call from Lawrence F. Williams, another former employee of Jeno's. (Respondent's A10, ¶ 26). Williams had previously filed suit against Jeno's in federal court in Atlanta, Georgia, alleging that he, too, had been discharged because of his age. Williams forwarded to Heideman a memorandum written by Carl Hill dated December 21, 1978, expressing a preference for younger workers ("Hill memorandum") (Respondent's A10, ¶ 26).

After receiving the Hill memorandum, Heideman filed a charge of age discrimination with the U.S. Equal Employment Opportunity Commission. (Respondent's A10-11, ¶ 27). On November 25, 1987, over eight years after his termination (and nearly 15 months after receiving the Hill memorandum), Heideman and his wife filed the suit which is the subject of this case. (Respondent's A12, ¶ 30).

SUMMARY OF THE ARGUMENT

As this Court recently recognized, harsh facts have the potential to result in bad law:

> The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law- . . . compel[s] the result.

Texas v. Johnson, 109 S. Ct. 2533, 2548 (1989) (Kennedy, J., concurring). The offensive nature of the Hill memorandum will engender little sympathy for Respondent. Nevertheless, the courts below were correct in recognizing that Petitioners' claims were untimely and that judgment in Respondent's favor was the only legally correct result.

Other than the offensive nature of the Hill memorandum, there is nothing particularly important or novel about this case. While the overwhelming sympathies here lie with Petitioners, this case, stripped of sympathy and emotion, is a "garden variety" statute of limitations case. There can be no reasonable conclusion other than that reached in the courts below – Petitioners' claims are time-barred as a matter of law. A contrary conclusion in this case would render the 180-day charge filing period under the Age Discrimination in Employment Act (as well as the other statutes of limitations in issue) virtually meaningless.

Petitioners place great emphasis on the argument that the Company failed to disclose, and even wanted to conceal, its alleged discriminatory motive. Such an argument misses the point. It is a rare case indeed in which the employer openly discloses to the employee that he or she is being terminated for a discriminatory reason. The law logically requires something more than concealment or nondisclosure of the discriminatory bias in order to toll the limitations period. That "something more" is lacking in this case.

Regardless of whether this case presents an important or novel issue to warrant the Court's review, to toll the charge filing period, Heideman must demonstrate that the Company engaged in affirmative conduct on which he actually and reasonably relied thereby preventing the filing of a timely charge and complaint. Not only can Heideman not meet this burden of demonstrating actual and reasonable reliance on his part, the facts are powerfully to the contrary.

Respondent did nothing to lead Heideman to believe that he had no legal recourse. In fact, Heideman's own actions belie such an allegation. Heideman admits that he never believed for a moment the reasons given by the Company for his discharge. To the contrary, Heideman believed at the time of his discharge that he was being lied to and that "there had to be another reason." (Heideman Depo. p. 185). Heideman so disbelieved the reasons given him for his discharge that he went to a private attorney in addition to going to the National Labor Relations Board for information and advice. Thus, as a matter of law and fact, Heideman was not fooled by the reason he was given for his discharge.

Moreover, there are no credibility determinations or factual disputes presented in this case. The parties jointly stipulated to the facts which the courts below relied on in ruling on the Motion for Summary Judgment. (Respondent's A4-13). Based upon those undisputed, stipulated facts, the district court properly concluded, and the Eighth Circuit affirmed, that Respondent was entitled to summary judgment under Federal Rule of Civil Procedure 56(c).

REASONS FOR DENYING THE WRIT

I.

THE ISSUES PRESENTED BY THIS CASE ARE NOT SUFFICIENTLY IMPORTANT OR NOVEL TO WARRANT REVIEW BY THIS COURT.

In the Writ, Petitioners attempt to argue that the law regarding tolling is unsettled. Nothing could be farther from the truth. The law on tolling of limitations periods is well settled – a limitations period may be tolled where the employer engages in affirmative conduct which actually prevents the filing of a timely claim. Just because Petitioners disagree with the way the tolling doctrine was applied in this case does not mean the law in the circuits regarding tolling is inconsistent or unsettled.

The doctrine of equitable tolling is well defined in virtually every circuit[1] as well as in the prior decisions of

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[1] *English v. Pabst Brewing Co.*, 828 F.2d 1047 (4th Cir. 1987), *cert. denied*, 486 U.S. 1044 (1988) (summary judgment for employer where plaintiff could not show that employer actions caused delay in filing action); *Wilson v. Westinghouse Elec. Corp.*, 838 F.2d 286 (8th Cir. 1988) (summary judgment granted on equitable tolling issue where plaintiff contended that he had been led to believe his employment would continue but where record showed plaintiff had applied for over 50 jobs in the interim); *Kriegesmann v. Barry-Wehmiller Co.*, 739 F.2d 357, 358-359 (8th Cir.), *cert. denied*, 469 U.S. 1036 (1984) (summary judgment affirmed as to equitable tolling provision of severance benefits and job referrals do not toll statute); *Kazanzas v. Walt Disney World Co.*, 704 F.2d 1527, 1532 (11th Cir.), *cert. denied*, 464 U.S. 982 (1983) (no equitable tolling where employer did not tell plaintiff it would reinstate him and did nothing to prevent plaintiff from consulting an attorney or bringing a suit); *Naton v. Bank of California*, 649 F.2d 691 (9th

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this Court, and this Court has declined to review similar cases on several prior occasions. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984) (in Title VII case, court holds that one who fails to act diligently in pursuing one's rights cannot invoke equitable principles to excuse that lack of diligence or toll running of the statute). In short, the issues raised by Petitioners have been litigated numerous times, the law is well-settled and there is no need for clarification or modification of the law of equitable tolling.

II.

THIS CASE WAS CORRECTLY DECIDED ON SUMMARY JUDGMENT AND ON APPEAL IN THE EIGHTH CIRCUIT.

In evaluating the appropriateness of the district court's grant of summary judgment and the Eighth

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Cir. 1981) (actual and reasonable reliance on defendant's conduct and misrepresentations must be shown before equitable estoppel applies); *Blumberg v. HCA Management Co.*, 848 F.2d 642 (5th Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989) (court rejected plaintiff's argument that she had been misled by the employer's statement that she was discharged "for cause" when she was actually fired because of her age); *Klausing v. Whirlpool Corp.*, 623 F. Supp. 156, 162 (S.D. Ohio 1985), appeal dismissed without opinion, 785 F.2d 309 (6th Cir. 1986) (no equitable tolling where plaintiff claimed that defendant employer had fraudulently refused to inform him of the true reasons for his demotion thereby allegedly tolling the limitations period and where plaintiff later received actual evidence that his demotion had been discriminatory on the basis of his age); *Eubanks v. Harvard Indus., Inc.*, 712 F. Supp. 146, 148 (E.D. Ark.), *aff'd*, 889 F.2d 1092 (8th Cir. 1989).

Circuit's affirmance, it is important to note that the decisions below were made on a *stipulated factual record*. The parties also stipulated that the district court could refer to the deposition transcripts and deposition exhibits "to the same extent as if the deponents were personally testifying under oath before this Court, and the deposition exhibits were offered into evidence." (Respondent's A12, ¶ B). Hence, the usual limitations of summary judgment, such as where there are credibility issues or disputed issues of fact, are non-existent here since the parties *agreed* upon virtually all of the facts material to the summary judgment motion, and further agreed that the depositions and deposition exhibits could be given the same weight and consideration by the court as if the testimony and exhibits were presented live at an actual trial on the tolling issue.

Rule 56 of the Federal Rules of Civil Procedure, as reaffirmed in this Court's "summary judgment trilogy," is critical to the functioning of our judicial system. In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *cert. denied*, 484 U.S. 1066 (1988), the first of this Court's "summary judgment trilogy," the Court reaffirmed the importance of the summary judgment procedure "as an integral part of the federal rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action' . . . . " *Id.* at 327 (quoting Fed. Civ. Proc. 1) (citations omitted).

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), this Court further stated that "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

Finally, in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *cert. denied*, 481 U.S. 1029 (1987), the Court emphasized:

> Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial."

Id. at 587 (quoting Fed. R. Civ. Proc. 56(e)).

A. Mr. Heideman's Age Discrimination Claim Is Time-Barred, And Therefore Summary Judgment was Appropriate.

In order to sue for age discrimination under the ADEA, a plaintiff must first file a charge of discrimination with the EEOC within 180 days of the alleged unlawful employment practice. 29 U.S.C. § 626(d)(1) (1982). The timely filing of a charge of age discrimination with the EEOC is a condition precedent to suit under the ADEA and functions as a statute of limitations. *Kriegesmann v. Barry-Wehmiller Co.*, 739 F.2d 357, 359 (8th Cir.), *cert. denied*, 469 U.S. 1036 (1984). Further, suit must be commenced within two years of the alleged unlawful occurrences or within three years in the case of a willful violation. 29 U.S.C. § 626(e) (1982). Neither the 180-day charge filing period nor the two or three year statute of limitations for filing suit was met in the present case.

Where the challenged employment decision is discharge, the charge filing and suit filing limitation periods begin to run from the date on which the employee is notified of the discharge. *Delaware State College v. Ricks*, 449 U.S. 250 (1980) (Title VII case; court holds that charge

filing period begins to run from the time that the employee had notice of the adverse employment action); *Mogley v. Chicago Title Ins. Co.*, 719 F.2d 289, 290 (8th Cir. 1983). Applying this standard, Heideman's age charge was filed over seven years too late. Heideman was notified of his discharge in June, 1979, but did not file a charge of age discrimination until September 5, 1986 and did not file suit until November, 1987. Accordingly, the courts below properly concluded that Heideman's age discrimination claim was time-barred.

B. The Courts Below Properly Held That There Was No Basis For Tolling The Charge Filing Period In This Case.

Under certain limited circumstances, the charge filing period under the ADEA may be subject to equitable tolling. Equitable tolling of the charge filing period is an extraordinary remedy that should not and cannot be used simply to preserve a plaintiff's case because of sympathy for the litigant. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984) (Title VII). Only where the defendant wrongfully deceives or misleads an employee in order to conceal the existence of a cause of action will the 180-day period be equitably tolled. *See e.g. English v. Pabst Brewing Co.*, 828 F.2d 1047 (4th Cir. 1987), *cert. denied*, 486 U.S. 1044 (1988). "Although the filing period may be tolled for sufficient legal justification, the courts are reluctant to do so, and the plaintiff bears the burden of proving facts which would justify tolling." *Eubanks v. Harvard Indus., Inc.*, 712 F. Supp. 146, 148 (E.D. Ark.), *aff'd*, 889 F.2d 1092 (8th Cir. 1989).

Under the ADEA, equitable tolling applies only where the plaintiff is able to establish one of two things: either that the employer did not comply with the notice posting requirement of the Act, or that the employer engaged in some sort of affirmative conduct which prevented the filing of the charge of discrimination. Neither circumstance is present here.[2]

The Company did not engage in any affirmative conduct which would justify tolling the limitations period. The doctrine of equitable estoppel relied on heavily by Petitioner applies only where an employer makes affirmative misrepresentations *on which an employee actually and reasonably relies*, thereby preventing the filing of a timely charge. *Naton v. Bank of California*, 649 F.2d 691 (9th Cir. 1981); *Blumberg v. HCA Management Co.*, 848 F.2d 642 (5th Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989). To establish affirmative conduct by a party justifying the tolling of the limitations period, the plaintiff must show that the employer misled him as to the finality of his termination or in some other extraordinary way prevented him from asserting his rights. *Compare, Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584 (5th Cir. 1981) (issue exists as to whether filing period was tolled where employer misrepresented his intention to reinstate plaintiff, thereby inducing plaintiff to forego from filing ADEA claim) with *Kazanzas v. Walt Disney World Co.*, 704 F.2d 1527 (11th Cir.), *cert. denied*, 464 U.S. 982 (1983) (no equitable tolling where employer did not tell plaintiff it would reinstate him or actively prevent the filing of suit or consulting

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[2] It is undisputed that the required ADEA notices were properly posted at the time of Heideman's discharge.

with an attorney). The filing period is not tolled simply because the plaintiff alleges that he was not aware of sufficient facts as to realize that he was the victim of age discrimination. *Eubanks v. Harvard Indus., Inc.*, 712 F. Supp. 146, 148 (E.D. Ark. 1989), *aff'd*, 889 F.2d 1092 (8th Cir. 1989); *Caudill v. Farmland Indus., Inc.*, 698 F. Supp. 1476, 1481 (W.D. Mo. 1988). Thus, only where the employer engages in overt "conduct likely to mislead plaintiff into sleeping on his rights" will the employer be equitably estopped from asserting the statute of limitations defense.

Heideman's argument on the equitable estoppel theory is simple – he argues that because he was given an allegedly pretextual reason for his discharge, and was not given the real reason – age, he was misled into delay in filing a charge. If such an argument were accepted, the charge-filing period would become meaningless. Discrimination cases by their very nature almost always involve the claim that the plaintiff was provided with a pretextual reason for the employment action under scrutiny. *If the mere allegation that the plaintiff was provided with a pretextual reason for the employment action were enough to toll the statute of limitations, the statute would be tolled in virtually every employment discrimination case.*

The mere fact that an employee contends that he was not given the true reason for his termination (*i.e.* age) is not sufficient to toll the statute of limitations. In *Blumberg v. HCA Management Co.*, 848 F.2d 642 (5th Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989), the plaintiff argued that she had been misled by the employer's statement that she was discharged "for cause" when in fact she was terminated because of her age. The court in *Blumberg* rejected

plaintiff's argument that because the employer "concealed" the true reason for her termination, it should be equitably estopped from asserting the limitations defense:

> Blumberg's suggestion that the Hospital somehow misled her by not expressly declaring that her discharge was due to her age is tantamount to asserting that an employer is equitably estopped whenever it does not disclose a violation of the statute. This would make the 180-day period virtually meaningless.

848 F.2d at 645.

Similarly, in *Klausing v. Whirlpool Corp.*, 623 F. Supp. 156, 162 (S.D. Ohio 1985), *appeal dismissed without opinion*, 785 F.2d 309 (6th Cir. 1986), the plaintiff was informed by another employee who had prevailed on an ADEA claim against the defendant of actual evidence that his demotion had been discriminatory on the basis of his age. The plaintiff claimed that the employer had fraudulently refused to inform him of the reasons for his demotion, thereby tolling the limitations period. The court rejected plaintiff's argument that the limitations period was tolled until he had obtained actual knowledge sufficient to prove his suspicion of discrimination. 623 F. Supp. at 162.

In order to invoke the doctrine of equitable estoppel, the plaintiff must have actually been misled. In *Naton v. Bank of California*, 649 F.2d 691, 696 (9th Cir. 1981), the court stated:

> A finding of estoppel must rest on consideration of several factors. *Of critical importance is a showing of the plaintiff's actual and reasonable reliance on the defendant's conduct or representations.* Also important is evidence of improper purpose on

> the part of the defendant, or of the defendant's actual or constructive knowledge of the deceptive nature of its conduct.

(citation omitted) (emphasis added).

Critically, Heideman never believed for a moment that the reason given to him for his discharge was the true reason. Indeed, the parties have stipulated that "[a]t the time of his termination or shortly thereafter, Mr. Heideman felt that the reason that Mr. Parr gave him was not the real reason that he was being terminated, and that he was being lied to." (Respondent's A9, ¶ 21).

Here, Heideman did not rely on anything Respondent said or did. The stipulation of the parties regarding the facts of this case says it all:

> At the time of his termination or shortly thereafter, *Mr. Heideman felt that the reason that Mr. Parr gave him was not the real reason that he was being terminated,* and that he *was being lied to.*
>
> Mr. Heideman suspected, after being notified of his termination, that *he had been lied to* by Mr. Hill when he was demoted and offered the position in Memphis, in that Mr. Hill then actually wanted to cause Mr. Heideman to voluntarily resign, or terminate him shortly after transferring him to the Memphis office, not have him build the Memphis region. Mr. Heideman did not have any opinion or belief, however, as to the real reason he was terminated.
>
> Mr. Heideman visited a federal agency office in Memphis, Tennessee . . . in an effort to see if he could get some help *in forcing Defendant to tell him the reason for his termination.* . . .
>
> The same day Mr. Heideman visited the federal agency office, he visited with the attorney

> referred to him by the agency representative. . . . *The attorney offered to look into the matter* if Mr. Heideman was willing to pay him $70.00 per hour. Under the circumstances, Mr. Heideman decided it did not make sense to employ the attorney, so *he just dropped the matter.*

(Respondent's A9-A10, ¶ ¶ 21, 22, 23, 24) (emphasis added).

As stipulated by the parties, Heideman actually took action to protect his rights. He visited a federal agency in Memphis, Tennessee (apparently the National Labor Relations Board or perhaps the Department of Labor) "in an effort to see if he could get some help in forcing Defendant to tell him the reason for his termination." (Respondent's A9, ¶ 23). Heideman also contacted a private attorney "who offered to look into the matter." (Respondent's A9-A10, ¶ ¶ 23-24). Moreover, the inability of Heideman to obtain a reason for his termination that he deemed to be an adequate explanation should further have alerted Heideman to the possibility of a discriminatory motive. *See Mull v. Arco Durethene Plastics, Inc.*, 599 F. Supp. 158, 166 (N.D. Ill. 1984), *aff'd*, 784 F.2d 284 (7th Cir. 1986) ("if anything, Arco's failure to issue a formal written notice [of termination] should have alerted Mull to the possibility that he was being treated discriminatorily."). In short, Heideman was not lulled by Respondent into sleeping on his rights.

Petitioners rely extensively on the *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975), in support of their assertion that equitable estoppel should apply in this case. In *Reeb*, the female plaintiff *relied* on

the employer's statement that her job was being eliminated only to learn later that she had in fact been replaced by a less qualified male. In contrast, here Heideman did not rely on anything – in fact, he believed from the outset that he had been lied to.

Petitioners also place special emphasis on two other decisions: *Meyer v. Riegel Prods. Corp.*, 720 F.2d 303 (3d Cir. 1983), *cert. dismissed*, 465 U.S. 1091 (1984) and *Richards v. Mileski*, 662 F.2d 65 (D.C. Cir. 1981). Neither case is on point. In *Meyer v. Riegel Prods. Corp.*, 720 F.2d 303 (3d Cir. 1983), *cert. dismissed*, 465 U.S. 1091 (1984), the plaintiff demonstrated actual reliance on alleged misrepresentations by the employer. *Richards v. Mileski*, 662 F.2d 65 (D.C. Cir. 1981), a non-ADEA case, also involved actual reliance by the plaintiff on statements made by the employer, statements which left the plaintiff no reason to doubt the employer's explanation. Further, *Richards* was decided in the context of a motion to dismiss where the court had no facts, apart from the pleadings, in front of it. The *Richards* court expressly stated that tolling issues were particularly difficult to resolve on a motion to dismiss before any discovery had been taken. Here discovery had been completed and a broad stipulation of facts agreed upon by the parties.

Petitioners attempt to make much of the fact that Judge Magnuson in the District of Minnesota denied summary judgment in a case where the Hill memorandum was also at issue ("the Minnesota cases"). Petitioners overlook two critical facts. First, Judge Magnuson did not have the benefit of a stipulated factual record such as the one presented here. Second, in his Decision

set forth at A80 in Petitioners' Appendix, Judge Magnuson goes to great lengths to distinguish the *Heideman* case from the Minnesota cases. In the Minnesota cases, "each plaintiff *believed* that either his actions, or business conditions generally, compelled his own termination. . . . " (Petitioners' A84) (emphasis added). In other words, the plaintiffs in the Minnesota cases, unlike Heideman here, relied on and believed what the Company told them, and Judge Magnuson expressly noted that critical distinction between the Minnesota cases and the Heideman case presented here.

Heideman had more than an adequate basis *in 1979* upon which to file an administrative charge of discrimination with the EEOC, and nothing the Employer did discouraged him from doing so. Specifically, Heideman knew or believed the following: (1) he was fifty-three years old; (2) he was demoted and then discharged; (3) he was replaced in Kansas City by someone 10 to 15 years younger than himself; (4) his job performance had never been criticized; (5) the reason he was given for his discharge was a lie; and (6) he had constructive knowledge of his rights under the ADEA.[3] Because "the time begins when the facts that would support a cause of action are or should be apparent," *Blumberg v. HCA Management Co., Inc.*, 848 F.2d 642, 645 (5th Cir. 1988), *cert. denied*, 848 U.S. 1007 (1989), the charge-filing began to run when Heideman was demoted and then discharged in 1979. As explained by the court in *Blumberg*:

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[3] Although Heideman "did not remember" seeing the ADEA poster, it was undisputed on appeal that such notices were properly posted, thus affording Heideman constructive knowledge of his ADEA rights.

> [I]t is not necessary for a claimant to know all of the evidence for her to file a claim or to begin the 180-day period. . . .

848 F.2d at 645.[4]

A similar common sense approach was taken by the Seventh Circuit Court of Appeals in *Vaught v. R.R. Donnelly & Sons*, 745 F.2d 407 (7th Cir. 1984). There the employee sought to excuse the untimely filing of his age discrimination charge by arguing that it was only after the 180-day charge-filing period had expired that he became aware of facts sufficient to support a discrimination charge. The court disagreed, concluding that the charge-filing period began to run at the time the employee was demoted. In reaching that conclusion, the court observed:

> Vaught knew more than enough facts to establish his prima facie case: he knew that he was fifty-nine years old; he knew that he had always received very good job performance evaluations and, so far as he knew, had no reason to expect his job was in danger; he knew that he was demoted; and he knew that he was being replaced by a man he believed to be twenty years his junior.

---

[4] In *Blumberg*, the Fifth Circuit concluded that the charge-filing period began to run at the time of the employee's discharge where she "knew that she was a member of the protected age class, she knew that she had been terminated from a job she considered herself qualified to perform, and she believed her replacement to be a woman in her thirties." 848 F.2d at 645. Similarly here, and for similar reasons, the charge-filing period began to run at the time of Heideman's discharge.

745 F.2d 411. Accordingly, summary judgment for the employer was affirmed on the issue of equitable estoppel. The same result is appropriate here.

Petitioners seem to argue that the offensive nature of the Hill memorandum itself establishes that tolling is appropriate. However, the Hill memorandum goes to the merits of the case - whether Heideman was the victim of age discrimination. The applicability of equitable estoppel is not determined by the merits of the underlying claim or the sympathy quotient present were the case to be tried. Heideman is attempting to circumvent the statute of limitations problem by arguing that because he was discriminated against (as shown by the Hill memorandum), he by necessity had to have been lied to, thus tolling the limitations period. However, the merits of the underlying claims cannot determine the appropriateness of tolling. Summary judgment was properly granted on Heideman's age discrimination claim.

III.

SUMMARY JUDGMENT WAS PROPERLY GRANTED AGAINST HEIDEMAN ON HIS ERISA CLAIM.

ERISA does not contain a statute of limitations for civil actions and therefore, the Court must look to the most analogous and appropriate state statute of limitations. *Jenkins v. Local 705 Int'l Bhd. of Teamsters Pension Plan*, 713 F.2d 247, 251 (7th Cir. 1983). Under Tennessee law, an action under § 1132 of ERISA is governed by the six year statute of limitations applicable to contracts contained in Tennessee Code Annotated § 28-3-109 (1980). *Haynes v. O'Connell*, 599 F. Supp. 59, 62 (E.D. Tenn. 1984).

As correctly noted by the Court of Appeals, in 1979 the Heidemans were aware of sufficient facts to put a reasonable person on notice of a possible claim: they knew of their own health problems, they understood that the Company was aware of such health problems, they believed that Leo Heideman had been fired without a legitimate reason. (Petitioners' A22). Thus, Heideman's ERISA claim, like his age discrimination claim, was untimely and there is no legal basis for tolling the statute of limitations as to such claim.

IV.

SUMMARY JUDGMENT WAS PROPERLY GRANTED ON PETITIONERS' STATE LAW CLAIMS

Petitioners' criticism of the lower courts' resolution of the choice of law question is also devoid of merit. A senior district judge sitting in Kansas City, Missouri surely knows how to apply Missouri choice of law rules, as does a three judge panel of the Eighth Circuit sitting in St. Louis, Missouri. In any event, as explained by the Court of Appeals, Petitioners' state law claims are time-barred under *both* Tennessee *and* Missouri law. (Petitioners' A24, Ftnt.4).

V.

THE APPELLATE STANDARD OF REVIEW IN THIS CASE IS THE "CLEARLY ERRONEOUS" STANDARD.

The proceedings in the district court regarding the stipulation on the factual issues relevant to the limitations issue constituted a Rule 42(b) evidentiary hearing on the merits tried to the court by consent of the parties.

Thus, Petitioners waived their right to a jury trial by their conduct, stipulations, and failure to object to the proceedings. Accordingly, even though the District Court's and Appeals Court's finding merit affirmance even under the strict standard of *de novo* review, the appropriate standard of appellate review in this case is the Rule 52(a) "clearly erroneous" standard.

At the August 31, 1988 pretrial conference, the statute of limitations issue on summary judgment was separated pursuant to Federal Rule of Civil Procedure 42(b). A pretrial order to that effect was entered. (Respondent's A1-3). In that pretrial order, the parties were requested to "confer and to attempt to agree upon a full stipulation of facts upon which the separated issues may be determined by this Court." (Respondent's A1, ¶ 2(a)). In its Order, the District Court stated that it anticipated that counsel for the parties "may be able to agree that the depositions [transcripts] and the deposition exhibits be attached to the statute of limitations stipulation for consideration by the Court and *in order that the Court may resolve any material facts that may otherwise be in dispute on the basis of that record.*" (Respondent's A1, ¶ 2(a)) (emphasis added).

The parties did just that. The parties agreed upon and submitted a number of factual stipulations regarding the statute of limitations issues. (Respondent's A4-13). In addition to the factual stipulations, the parties agreed and stipulated that, in ruling on the limitations issues pursuant to Rule 42(b), the district court "may refer to the transcripts of all depositions taken in the instant litigation, and to the deposition exhibits, *to the same extent as if the deponents were personally testifying under oath before this*

Court, and the deposition exhibits were offered into evidence." (Respondent's A18, Section B) (emphasis added). Petitioner is bound by those stipulations. *See Skeets v. Johnson*, 816 F.2d 1213, 1215 (8th Cir. 1987) (en banc) (holding that a party's stipulation of facts is controlling and conclusive and the court is bound to enforce the facts as stipulated).

The procedures utilized by the district court in this case were virtually identical to those used in *Hrzenak v. White-Westinghouse Appliance Co.*, 682 F.2d 714, 717 and n.6 (8th Cir. 1982). In *Hrzenak*, the defendant moved for partial summary judgment on the basis of the plaintiff's failure to file a timely charge of age discrimination. In response, plaintiff raised the issue of equitable tolling and, like Heideman here, stipulated to certain facts and consented to a pretrial evidentiary hearing on the issue before the district court, despite the fact that the plaintiff was entitled to and apparently demanded a jury trial. The Eighth Circuit noted that the district court there correctly determined that the defense of failure to file a timely charge is not jurisdictional and that "the proper procedure was to hold a hearing to determine whether the circumstances would support a finding of equitable tolling." *Id.* at 717 n.6. The court further noted that "pursuant to this determination the district court included a provision in the pretrial order which provided a pretrial hearing on [defendant's] motion for summary judgment. Thereafter counsel for both parties executed the pretrial order including a stipulation of uncontroverted facts."

The district court in *Hrzenak* granted defendant's motion for summary judgment on the limitations issue, and the plaintiff appealed. The Eighth Circuit stated:

> We do not view the proceeding below as one for summary judgment. See *Nielsen v. Western Elec. Co.*, 603 F.2d 741 (8th Cir. 1979). *Here, as in Nielsen, the record reflects that both parties treated the proceeding as a trial on the factual issues underlying [plaintiff's] claim for equitable tolling.* . . .
>
> Since all the evidence on the issue of equitable tolling was presented and argued, we consider the district court proceeding to have been a hearing in the nature of a trial on that issue. There is no reason why the parties cannot agree to try certain issues on the merits and if the parties have done so, we properly may treat such proceeding as a trial on those issues even though cast in the form of a motion for summary judgment. [Citations omitted]
>
> *Because we treat the district court proceeding as a trial on the factual issues underlying [plaintiff's] claim for equitable tolling, we are bound by the district court's findings unless they are clearly erroneous.* [Citing Rule 52(a) and *Nielsen*, 603 F.2d at 742].

Hrzenak, 682 F.2d at 718 (emphasis added).[5]

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[5] *Stewart v. RCA Corp.*, 790 F.2d 624, 629-631 (7th Cir. 1986) (stating that the statute of limitations defense "is a prime candidate for a limited trial under Rule 42(b)"; holding that when a party implicitly consents to the resolution of a disputed issue in a partial bench trial under Rule 42(b), demand for jury trial was deemed waived and "clearly erroneous" standard governs appellate review of district court's conclusions); *United States v. 1966 Beechcraft Aircraft*, 777 F.2d 947, 950-951 (4th Cir. 1985) (holding that a party waives the right to jury trial by failing either to object to district court's determination of dispositive issues of fact or to in any way remind district court of earlier demand for jury trial); *Royal Am. Managers, Inc.*

(Continued on following page)

At no time up to the present have Petitioners argued that they did not have an adequate opportunity to present all of their evidence on the limitations issue to the district court. Indeed, most if not all of the relevant evidence on this issue comes directly word-for-word from the parties' stipulations and Petitioner Heideman's own deposition testimony which the parties specifically agreed could be considered and evaluated by the district judge as if the deponent were testifying live in court so as to permit the court to "resolve any material facts that may otherwise be in dispute. . . . " (Respondent's A1, ¶ 2(a)).

The record containing the parties' stipulation is unequivocally clear that the parties and the district court consented to and treated the proceeding below as a separate trial on the merits to the court pursuant to Rule 42(b). Therefore, the appellate review in this case is governed by the Rule 52(a) "clearly erroneous" standard. *See Anderson v. City of Bessemer City,* 470 U.S. 564 (1985). For that reason as well, the Petition should be denied.

(Continued from previous page)

v. IRC Holding Corp., 885 F.2d 1011, 1018-1019 (2d Cir. 1989); *Allen v. Barnes Hosp.*, 721 F.2d 643 (8th Cir. 1983) (plaintiff's failure to object to submission of employment discrimination action to court deemed waiver of right to jury trial despite earlier demand therefore).

VI.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for A Writ of Certiorari be denied.

Atlanta, Georgia on November 28, 1990.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LEO HEIDEMAN and SHIRLEY HEIDEMAN,	:	
Plaintiffs,	:	No. 88-0010-CV-W-JWO
vs.	:	
PFL, INC., et al.,	:	(Filed August 31, 1988)
Defendants.	:	

ORDER

At the pretrial conference held this day, counsel agreed and the Court approved the following:

1. That this case not be set for trial on the joint trial docket to commence September 26, 1988.

2. That the statute of limitations issues presented in defendants' pending August 24, 1988 motion for summary judgment should be and are hereby separated for determination pursuant to Rule 42(b) of the Federal Rules of Civil Procedure and that those issues shall be determined in accordance with the following procedures:

(a) The parties will be granted until September 26, 1988 to confer and to attempt to agree upon a full stipulation of facts upon which the separated issues may be determined by this Court. It is anticipated that counsel may be able to agree that the depositions and the deposition exhibits be attached to the statute of limitations stipulation for consideration by the Court and in order

that the Court may resolve any materials facts that may otherwise by in dispute on the basis of that record.

(b) In the event the parties are unable to agree on a full stipulation of facts as provided in paragraph 2(a), they shall nevertheless agree upon a partial stipulation of facts in which all factual data, including the attachment of depositions and deposition exhibits shall be reduced to writing and filed with the Court on or before September 26, 1988.

(c) In the event the parties are able to file only a partial stipulation, they shall also simultaneously file a separate joint written report on September 26, 1988 in which each party shall set forth with particularity the factual data that each party believes should be before the Court in its determination of the pending motion for summary judgment about which they have not been able to agree. The joint written report of counsel shall also state whether either party believes that the factual data identified by opposing counsel is not a "material fact" within the meaning of Rule 56 of the Federal Rules of Civil Procedure. Appropriate briefs shall be separately filed by each party to support the respective contentions of the parties in regard to the materiality of the factual data identified.

3. In the event the parties are able to agree upon and file a full stipulation of facts on September 26, 1988 as provided in paragraph 2(a) above, plaintiffs shall prepare, serve, and file their suggestions in opposition to defendants' pending motion for summary judgment on or

before October 14, 1988. Defendants shall file their reply suggestions in support on or before October 21, 1988.

4. In the event the parties are able to agree only on a partial stipulation as provided in paragraph 2(b) above, the Court will enter orders directing further proceedings in light of the facts agreed upon in the partial stipulation, the joint written report file by counsel, and the briefs filed by the parties.

5. If the parties agree that the dates above set forth need to be extended a reasonable period of time, they shall confer and present an agreed order extending the deadlines above set for the Court's approval. All agreed orders for extensions of time shall be presented before the expiration of the time periods established by this order.

IT IS SO ORDERED.

/s/ John W Oliver
John W. Oliver
Senior Judge

Kansas City, Missouri

August 31, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LEO HEIDEMAN, et ux.,	)	
Plaintiffs,	)	Case No. 88-0010-CV-W-JWO
v.	)	
PFL, INC.	)	
Defendant.	)	

STIPULATIONS REGARDING STATUTE OF LIMITATIONS ISSUES

A. FACTUAL STIPULATIONS

The parties hereto, through their respective counsel, hereby stipulate to the following facts:

1.

Plaintiff Leo Heideman ("Mr. Heideman") was hired by Defendant on or about July 12, 1964, as Regional Manager, North Central Region.

2.

Defendant is a Minnesota corporation whose corporate name at all times pertinent to the instant litigation was Northland Foods, Inc., Jeno's, Inc. or PFL, Inc.

3.

Mr. Heideman's initial salary as an employee of Defendant was $10,400 per year.

4.

Mr. Heideman was born on February 1, 1926, in Seneca, Kansas. He moved to Kansas City, Missouri, in 1942, and has lived in Kansas City or Lee's Summit, Missouri, continuously since 1942, with the exception of several months in 1979, when he lived in Germantown, Tennessee.

5.

In 1967, Mr. Heideman was promoted to the position of National Field Sales Supervisor, and from 1970 to 1978 worked in several different management positions with Defendant, as a vice president, the last of which was Vice President, Sales, for the Central Division of Defendant.

6.

Starting in approximately 1970, and continuing at least through 1979, Defendant divided its sales activity within the Continental United States into approximately two or three divisions, each of the divisions consisting of a multi-state area. Each division, in turn, was divided into several different geographically smaller Regions.

7.

During the course of his employment with Jeno's, Inc., Mr. Heideman worked primarily out of his home in Kansas City, Missouri, and traveled on a varying basis (approximately on a monthly basis) to the corporate headquarters of Jeno's, Inc. in Duluth, Minnesota. He

would ordinarily stay in Duluth, when making these visits, a day and a night.

8.

At various times during Mr. Heideman's employment with Defendant, executive officers of Defendant expressed a preference that Mr. Heideman move to Duluth, Minnesota, where Defendant maintained its corporate headquarters. At no time, however, did Defendant issue an ultimatum to Mr. Heideman to move to Duluth, or lose his position of employment with Defendant.

9.

On or about December 6, 1978, Carl Hill ("Mr. Hill") was employed by Defendant as Senior Vice President, Marketing and Sales. He had previously been employed by Defendant from about 1967 or 1968 until 1972. At the time he left Defendant's employment in 1972, he was Executive Vice President of Marketing and Sales.

10.

On or about January 3, 1979, Mr. Hill's actual authority was made co-extensive with that of the then president of Defendant, Dick Jones ("Mr. Jones"), and Mr. Hill reported directly to the chairman and vice chairman of Defendant, not to Mr. Jones.

11.

On or about December 21, 1978, Mr. Hill wrote a confidential memorandum ("the Hill memo") to Mr. Jones

regarding what Mr. Hill referred to as "additional responsibilities for Parr and Carpenter." Parr and Carpenter, as referred to in the Hill memo, were John Parr ("Mr. Parr"), then the Vice President of Sales of Defendant, and Morris J. Carpenter ("Mr. Carpenter"), then the Vice President of Marketing of Defendant, both of whom reported to Mr. Hill. Mr. Parr was then Mr. Heideman's immediate supervisor.

12.

Courtesy copies of the Hill memo were directed to be delivered to Mess'rs. Parr, Carpenter and Mick Paulucci ("Mr. Paulucci"). Mr. Paulucci was then the Vice Chairman of the Board of Directors of Defendant. The document appended to this Stipulation as "Exhibit A" appears to be a true copy of the courtesy copy of that memo delivered to Mr. Carpenter; however, Defendant does not know who made the handwritten comments thereon, nor when they were made.

13.

Mr. Hill admits that it is possible, but thinks it unlikely, that he wrote the following words in the upper right-hand corner of the first page of the Hill memo "Jay – – Read and Destroy."

14.

Around Christmas, 1978, when Mr. Heideman was visiting Defendant's office in Duluth, Minnesota, Mr. Hill called Mr. Heideman into Mr. Hill's office and advised

Mr. Heideman that Mr. Heideman was being demoted from Vice President, Sales – Central Division, to Manager of the Memphis Region, that he was expected to build up the Memphis Region, that he would have to move immediately and take over this new responsibility, and that Mr. Heideman would not receive any reduction in pay with respect to the demotion.

15.

After considering the proposed relocation to Memphis, Tennessee, and demotion, and discussing the same with Mrs. Heideman, Mr. Heideman decided to accept the offered relocation and responsibility. Had he not accepted the offer, he would not have been able to continue his employment with Defendant.

16.

Mr. Heideman was replaced as a vice president of Defendant by Ed Korkki ("Mr. Korkki"). Mr. Korkki was born July 18, 1940.

17.

In early January, 1979, Mr. Heideman advised Defendant that he would accept the position offered in Memphis, and immediately undertook serving the Memphis Region by traveling to that Region (which included Memphis, Nashville and Johnson City, Tennessee; Jackson, Mississippi; Little Rock, and possibly, Fort Smith, Arkansas) from his home in Kansas City until he could

obtain permanent housing in Memphis on or about April 16, 1979.

18.

On or about June 1, 1979, Mr. Heideman was advised by Mr. Parr by telephone that Mr. Heideman was being terminated, immediately.

19.

Mr. Heideman lived, worked and was in Tennessee at the time that he was terminated, and had been assigned to the Memphis territory for approximately five months. Mrs. Heideman also resided in Tennessee with her husband.

20.

Mr. Heideman, during his entire employment by Defendant, never heard of any problems within Defendant's organization concerning age discrimination. It never occurred to him, until he subsequently received a copy of the Hill memo in 1986, that he might have been the victim of age discrimination practices by Defendant.

21.

At the time of his termination or shortly thereafter, Mr. Heideman felt that the reason that Mr. Parr gave him was not the real reason that he was being terminated, and that he was being lied to.

22.

Mr. Heideman suspected, after being notified of his termination, that he had been lied to by Mr. Hill when he was demoted and offered the position in Memphis, in that Mr. Hill then actually wanted to cause Mr. Heideman to voluntarily resign, or terminate him shortly after transferring him to the Memphis office, not have him build the Memphis Region. Mr. Heideman did not have any opinion or belief, however, as to the real reason he was terminated.

23.

Mr. Heideman visited a federal agency office in Memphis, Tennessee, which he believes to have been the National Labor Relations Board, in an effort to see if he could get some help in forcing Defendant to tell him the reason for his termination. The agency representative with whom he met stated that they were unable to help him, and referred him to a private attorney in Memphis. Mr. Heideman does not recall any mention made regarding age discrimination laws during his visit at the agency office.

24.

The same day Mr. Heideman visited the federal agency office, he visited with the attorney referred to him by the agency representative. The attorney advised Mr. Heideman that the employer did not have to give him a reason for termination, but could terminate him without a reason. The attorney offered to look into the matter if Mr.

Heideman was willing to pay him $70 per hour. Under the circumstances, Mr. Heideman decided it did not make sense to employ the attorney, so he just dropped the matter. Mr. Heideman does not recall any mention made regarding age discrimination laws during his visit with the attorney.

25.

Almost immediately after being advised by Mr. Parr that Mr. Heideman was terminated, Mr. and Mrs. Heideman decided to return to Kansas City. They sold their house in the Memphis area on or about August 14, 1979, and immediately moved back to Kansas City.

26.

On or about August 29 or August 30, 1986, Mr. Heideman received from Mr. Lawrence Williams ("Mr. Williams") an unsolicited copy of the Hill memo. This was the first time Mr. Heideman suspected that he may have been the victim of age discrimination practices by Defendant.

27.

Within two or three days after his receipt of the Hill memo, Mr. Heideman visited the Equal Employment Opportunity Commission ("EEOC") office in Kansas City, Missouri. Mr. Heideman filed a charge of discrimination with the EEOC on or about September 5, 1986.

28.

Mr. Heideman visited with one of his attorneys in the instant litigation, Mark J. Klein ("Mr. Klein"), on September 6, 1986, to determine if he had a right of private action against Defendant arising out of Defendant's actions.

29.

On August 23, 1986, before he had knowledge of the Hill memo, Mr. Heideman wrote to Jeno Paulucci stating his belief that he "was moved for a reason then fired on purpose."

30.

Plaintiffs filed suit in the Circuit Court of Jackson County, Missouri, on November 25, 1987, and this action was subsequently removed to this Court on January 4, 1988.

B. STIPULATION AS TO USE OF DEPOSITION TRANSCRIPTS AND EXHIBITS

The parties hereto, through their respective counsel, stipulate and agree that the Court may refer to the transcripts of all depositions taken in the instant litigation, and to the deposition exhibits, to the same extent as if the deponents were personally testifying under oath before this Court, and the deposition exhibits were offered into evidence.

Respectfully submitted,

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